

**C. What evidence of these behaviors
should be considered in evaluating
whether the broadcaster discriminated?**

The Commission should examine all relevant evidence of possible discrimination. In a discrimination case, "[a]ll relevant evidence is generally admissable" because the "inherent difficulty of proving discrimination often necessitates the use of circumstantial evidence as the method of proof." Allen v. County of Montgomery, 788 F.2d 1485, 1488 (11th Cir. 1986).

**1. Evidence from the words
of the licensee itself**

The licensee's own contentions in a renewal application or in response to a petition to deny often reveal discriminatory intent. See p. 311 supra. The Commission's official notice of and reliance on papers submitted to it is noncontroversial.

**2. Statistical evidence, adopting standards
comparable to those used in EEOC
systemic or class action litigation**

Statistics are the heart of any review of allegations of discrimination. In civil rights cases, "statistics often tell much and Courts listen." Alabama v. U.S., 304 F.2d 583, 586 (5th Cir.), aff'd, 371 U.S. 37 (1962). Sometimes statistics "do more than speak for themselves - they cry out 'discrimination' with unmistakable clarity." Muniz v. Beto, 434 F.2d 697, 702-03 (5th Cir. 1970). "Statistics may not give definitive answers, but they clearly can raise valid questions." Nondiscrimination - 1970, 23 FCC2d at 432.

Statistics can be an important source of proof in employment discrimination cases, since "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time

result in a workforce more or less representative of the racial and ethnide composition of the population in the community from which employees are hired." Teamsters v. United States, 431 U.S. 324, 340 n. 20 (1977) ("Teamsters").

Statistics are critical because of the paucity of individual complaints, owing to the NBC Policy, employees' fear of retaliation, employees' or job applicants' unawareness that they have been discrimination victims, and broadcast professionals' frequent decision not to waste time applying for work at a company with a reputation as a discriminator.

Statistical tests have their limitations. They cannot reveal whether a licensee discriminated by failing to consider minority or female applicants, or in whether a licensee discriminated by placing minorities or women in lower status positions, paying them less, offering them inferior benefit packages, harassing them on the job, or more readily reprimanding, suspending or terminating them. Only full discovery, including the testimony of well protected witnesses, could reveal such activity by a licensee.

Nonetheless, an enhanced ability to perform statistical tests would represent a significant advance in FCC EEO procedures, and potentially could result in an increase in the number of discriminators who no longer escape scrutiny merely because of the insufficiency of the evidence.

The Commission should take five steps to improve its use of statistical evidence.

First, the Commisssion should be far more assertive in drawing inferences of possible discrimination from statistics. The courts have long recognized that in applying the EEO Rule, "statistical evidence of an extremely low rate of minority

employment could constitute a prima facie showing of discrimination." Stone, 466 F.2d at 329-330. Indeed, while statistics often combine with other evidence to present an inference of discrimination, statistics can be an independent grounds for further inquiry.^{453/}

Meager statistical evidence is often overutilized to clear an accused. Unfortunately, the mere recruitment (or employment) of one minority has been enough to immunize a renewal application from further review.^{454/} However, statistical evidence is far underutilized in identifying likely discriminators.^{455/}

Second, the Commission should hold broadcasters to a higher standard of statistical review than the standard which would

^{453/} Bilingual II, 595 F.2d at 630 ("[b]efore the Commission is obliged to conduct further inquiry, however, it must before it either well-pleaded allegations of overt discrimination or statistical evidence of substantial underemployment of minority groups") (emphasis supplied). See also Judge Robinson's dissent in part in Bilingual II: "where a long-term disparity is established and no satisfactory explanation is given, it ordinarily can be expected that intentional manipulation has been worked." Id., 595 F.2d at 643 (Robinson, S., Dissenting in Part).

^{454/} Judge Robinson, dissenting in part in Bilingual II, was "unable to comprehend the Commission's half-stated position that statistics can be trusted to indicate an absence of intentional discrimination but not to indicate its presence." Id. at 652.

^{455/} See, e.g., Beaumont, 854 F.2d at 508 (where there was a substantial decline in minority employment, including the loss of ten of the station's eleven Black employees, followed by the inclusion of only three Blacks among the next 112 hires in a market which is 21.7% Black, "[t]he Commission in this case did not obtain the necessary information to determine that the very substantial discrepancy between black employment at the station and the number of blacks in the workforce was of benign origin.")

satisfy the burden of proof in an EEOC systemic case or class action.^{456/} Because they are public trustees, and because they are expected to set an example for other industries, broadcasters should be held to the highest standards of EEO performance. See Nondiscrimination - 1968, 13 FCC2d at 242. The EEOC expects the FCC's handling of evidence at least to measure up to EEOC standards.^{457/} However, the FCC's use of statistics in EEO review is far more rudimentary, and gives the respondent far more latitude than would EEOC statistical standards. Despite the superior importance of broadcasting, the FCC is the only EEO enforcement body in the nation whose statistical review has been inferior to EEOC standards.

^{456/} Because the evidentiary standards applied to broadcast licensees should exceed those of the EEOC, it is puzzling that the FCC at times rejects statistical proof by reciting that it is not the EEOC. See, e.g., Pasco Pinellas Broadcasting Company (WLVU-AM-FM, Dunedin/Holiday, Florida) (Reconsideration), 8 FCC Rcd 398, 399 ¶10 (1993), aff'd, Florida NAACP, 24 F.3d at 271 (stating that the petitioner had used a statistical test, the hypergeometric distribution, "which...the Commission does not employ" but giving no reason why the test was inappropriate). As Judge Robinson declared, dissenting in part in Bilingual II, the FCC "may not simply invoke talismanically the fact that it is not the Equal Employment Opportunity Commission to reject out of hand a statistical showing that in analogous areas of the law would indicate 'substantial under-representation' and erect a prima facie case of intentional discrimination" (fn. omitted). Id., 595 F.2d at 646.

^{457/} FCC/EEOC Agreement, 70 FCC2d at 2331, Appx. §III(a) (delegating to the FCC the task of processing those complaints which the EEOC is unable to handle; e.g., where a station's staff size is less than the EEOC's jurisdictional minimum of fifteen employees).

The FCC's statistical review should be comparable to a thoroughly investigated EEOC systemic or class action case.^{458/} These investigations liberally draw inferences from statistics, and the FCC should do so as well.

Third, the Commission should employ refined statistical tools to evaluate the likelihood that a station's recruitment strategy and results (or, where there is other extrinsic evidence of discrimination) its employment profile is attributable to discrimination. The Commission should employ generally accepted tests of statistical significance where the numerical levels are great enough.^{459/}

^{458/} In disparate impact cases, a lower level of statistical significance is needed than in a disparate treatment analysis. Page v. U.S. Industries, 726 F.2d 1038, 1054 (5th Cir. 1984); see also Rivera v. City of Wichita Falls, 665 F.2d 531, 545 n. 22 (5th Cir. 1982). Disparate treatment is established when the statistics show a "gross disparity" between the selection rates of a protected and nonprotected group. Hazelwood, 433 U.S. at 307-08. Disparate impact is established when the statistics show a "marked disproportion" between the selection rates of protected and nonprotected group. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

^{459/} In order to establish a statistical prima facie case of discrimination, it is necessary to determine the probability that the selection of a particular number of minorities or women out of all total selections could not have occurred by chance. See Hazelwood, 433 U.S. at 299. This calculation may be performed by using the hypergeometric distribution (sampling without replacement), which will closely approximate the binomial distribution.

The use of standard deviations is appropriate for large stations. An inference of purposeful discrimination can be drawn "[a]s a general rule for such a large sample, if the difference between the expected value and the observed number is greater than two or three standard deviations." Id. at 309 n. 14. Two standard deviations will encompass 91.43% of the total area under a normal curve and three standard deviations will encompass 95.73% of the total area under a normal curve.

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Fourth, the Commission should use current reliable population estimates to evaluate minority representation in the workforce, and it should not delay the use of Census data after its release.^{460/} Although minority populations in many areas of the country are increasing rapidly, the Commission used 1980 Census data until well into 1993. See Sage, 10 FCC Rcd at 4429. In virtually every case, the use of this ancient data favors renewal applicants and disfavors minorities. We know of no other EEO enforcement body which uses thirteen year old data when more recent data is available. The use of current data is particularly critical, given that Census data undercounts minorities in the first instance.

^{459/} [continued from p. 315]

A chi-square test might serve as a measurement of the extent to which the proportion of a protected group at the station is statistically significantly different from the proportion which would obtain if employees were drawn from the workforce at random. Such tests may be used when cell sizes are at least five, thereby allowing its use throughout most of the country for stations with at least 25-50 or more employees, or for hiring data over several years for stations of almost any size. For example: a station hires 200 people over four years; five were minorities. Minorities make up 20% of the population. A chi-square test with $n = 400$ and one degree of freedom would yield $\chi^2 = 30.6573$ and $p \leq 0.00001$ -- meaning that the probability that those hired are a representative sample of the population is virtually zero.

We acknowledge that under Lutheran Church, these tests cannot be used to determine whether a licensee adhered to the FCC's procedures aimed at ensuring equal opportunity. They can only be used to determine whether a licensee adhered to the nondiscrimination requirement.

^{460/} Virtually all licensees use such sources as Duncan, BIA and SRDS for financial planning and sales of airtime. These sources each report current demographic estimates. None relies on 13-year old Census data. No licensee can seriously claim that it does not know the demographic composition of its own community, which it covers as a journalist and which it was presumed to know in order to be freed of the ascertainment obligation. See Deregulation of Radio, 84 FCC2d at 1036.

Fifth, the Commission should expand the scope of its statistical analyses to measure recruitment data.^{461/} The large cell sizes generated by applicant flow data over a period of years would endow this data with considerable value as a measure of the effectiveness of recruitment procedures.^{462/}

3. Recidivism, including previous admonitions or sanctions unaffected by Lutheran Church, or the failure of a midterm review

Thirty-three years ago, the D.C. Circuit declared that "[w]hen past performance is in conflict with the public interest, a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest. Like public officials charged with a public trust, a renewal applicant...must literally 'run on his record.'"^{463/} An EEO recidivist carries an even heavier burden of demonstrating that its past record --

^{461/} The Tennessee Study provides aggregate measurements of this data, and demonstrates that the appropriate variables can be defined to yield useful data on these criteria.

^{462/} Small samples diminish the predictive value of statistical evidence, Teamsters, 431 U.S. at 340 n. 20, but the problem is not insurmountable. When a small sample precludes a finding of statistical significance, a finding of discrimination can be based on the statistics if augmented by other evidence of discrimination, Segar v. Smith, 738 F.2d 1249, 1283-84 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985).

^{463/} UCC I, 359 F.2d at 1007.

stretching back many years -- should be attributed to accidental or random factors.

Unfortunately, the Commission has exhibited a troubling tendency to look the other way rather than grapple with recidivists.^{464/} While recidivists are not the only EEO violators the Commission should scrutinize,^{465/} they are especially appropriate subjects for prosecution.

The Commission should announce a three-prong policy for dealing with EEO recidivists.

^{463/} See, e.g., BBC License Subsidiary, 10 FCC Rcd at 10975 ¶35 (Commission declines to revisit a previous renewal term in which it had found no EEO violations); Radio Ohio, Inc., 7 FCC Rcd 6355, 6358-59 ¶¶21-27 (1992) ("Radio Ohio") (declining to treat applicant as a recidivist even though it had an extremely poor EEO record during four license terms and drew sanctions in one of them); D.W.S., Inc., 7 FCC Rcd 7170, 7171 n. 6 (1992) (refusing to treat applicant as a recidivist although the applicant reported no top four category fulltime minority employees in twelve of the preceding fifteen years). These recidivism cases are good law even after Lutheran Church, since they involved evidence of very long term hiring records so extreme that they raised the question of intentional discrimination.

^{464/} A licensee's suggestion that its wrongdoing during one renewal term is but an isolated occurrence, an aberration, or was confined to a single investigation would prove too much. This "aberration" theory would excuse every licensee which commits misconduct only in one license term, and it would immunize every licensee from EEO scrutiny during its first eight years of operation. See Kathryn R. Schmeltzer, 7 FCC Rcd 8583, 8584 (Field Operations Bureau 1992) ("[r]egarding [the licensee's] statement that it has 'a history of overall compliance,' we note that this is the first time that [the licensee] has been inspected by the FCC, therefore, there has not been much of an opportunity to develop a history of either compliance or noncompliance.") None of the renewal applicants designated for hearing on an EEO issue since 1972 was a recidivist.

^{465/} No case designated for hearing on an EEO issue has ever involved an alleged recidivist.

First, all those with adverse EEO findings^{466/} in a previous renewal term should receive Bilingual letters upon their next renewal to ensure that recidivists do not escape review.^{467/}

Second, recidivist EEO violators should routinely be sent to hearing, permitting an ALJ to determine whether the licensee is

^{466/} These findings need not have been accompanied by specific sanctions, but could have resulted in admonishments. Admonishments, like reporting conditions, forfeitures, and short-term renewals, place the licensee on actual notice that its behavior is unacceptable under the rules. Accordingly a licensee's repetition of previously admonished conduct should give rise to an inference of recidivism. To hold otherwise would make a mockery of this tool as a remedy for EEO nonperformance and would send the message that broadcasters need not take mere warnings regarding EEO efforts seriously.

^{467/} An initial question is whether a licensee sanctioned under the former EEO Rule should be considered a recidivist under the proposed new regulations. The answer should turn on whether the Commission's findings of EEO violations were materially intertwined with an analysis, by the Commission at the time, of whether the licensee had employed minorities or women at levels consistently below the zone of reasonableness, where such hiring levels were not so extreme that they raised an inference of intentional discrimination. Thus, if a licensee had been sanctioned only for failure to recruit or failure to self-assess its EEO program (or for discrimination) it would be a recidivist for the purpose of the comparable new regulations. However, if it was sanctioned only for having hired or employed few minorities or women, it would not be a recidivist.

In proposing this approach, we follow the severability canon of statutory construction calling for tribunals to "save and not destroy" a statute where possible. The severability of statutory provisions turns on whether a legislature would have enacted the non-suspect provisions standing alone. See Alaska Airlines v. Brock, 480 U.S. 678, 685 (1987) ("the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.") "The analysis differs little in the context of invalidating provisions of regulations promulgated by an agency." See Alliance for Community Media v. FCC, 10 F.3d 812, 830 (D.C. Cir. 1993), aff'd, 518 U.S. 727, 767 (1995) (citing K Mart Corp. v. Cartier, Inc., 485 U.S. 281, 294 (1988)). Thus, the task before the Commission in evaluating the meaning of its former actions in light of current law is "to consider the residue of its original regulation." Alliance for Community Media, 10 F.3d at 830. A recidivism policy which gives life to former adjudicatory actions, to the extent those actions were based on inoffensive portions of its former EEO Rule, would be in keeping with established severability principles.

a serial and intentional discriminator.^{468/}

Third, an EEO-sanctioned licensee should be permitted to apply for, and earn, a Determination of Rehabilitation. Such a determination would entitle the licensee henceforth to be treated as a non-recidivist as to the specific conduct which led to the earlier sanctions.^{469/}

Adoption of this three-prong policy would serve the public interest. It would signal to all broadcasters that repeated violations (including those that previously resulted in the issuance of an admonishment) will not be tolerated and, therefore, it would serve as an effective deterrent to repeat EEO violations.

^{468/} In Tulsa 23, 4 FCC Rcd 2067 (1989), the Commission issued reporting conditions for the second renewal term in a row. In her Concurring Statement, Commissioner Patricia Diaz Dennis questioned this outcome, correctly observing that "progressive discipline is a well-established, time-tested approach for ensuring a corrective change in an employer's behavior...a more serious sanction is now in order." Id. at 2070. Now that the renewal term is eight years, a "three strikes" policy would result in no licensee going to hearing for repeated violations beginning in 1996 until the year 2020. In light of the longer renewal term and the greater privilege it awards to broadcast licensees, the Commission should adopt a policy that recidivists go to hearing.

^{469/} Such a Determination would be issued if:

1. All wrongdoing employees have undergone retraining or been fired;
2. Any individual or class victims have been made whole;
3. The misconduct has been entirely corrected; and
4. The correction continued even after the licensee was no longer operating under the scrutiny attendant to a Bilingual investigation, a hearing, EEO conditions, a short term renewal, or a petition to deny.

Consistent with Bilingual II, 595 F.2d at 634, the Commission should afford a petitioner to deny an opportunity to comment on the appropriateness of a Determination of Rehabilitation.

Furthermore, this approach would allow a recidivist to rehabilitate itself by demonstrating that it has permanently alleviated the previous EEO misconduct.

This approach would also be consistent with Lutheran Church because licensees would be treated as recidivists only if their previous license term or midterm review misconduct was due either to failure to adequately recruit or self-assess EEO efforts or to discrimination. Licensees would not be subject to this policy where their previous license term misconduct was related only to EEO hiring results or employment profiles.

4. EEO noncompliance at commonly owned stations

As the Commission entrusts fewer and fewer companies with stewardship of the nation's airwaves, it is essential that no company is allowed to operate as a systemic EEO violator in many cities at once. Isolated misconduct by one rogue manager is troubling, but company-wide misbehavior is absolutely unacceptable in this age of media concentration.

The Commission has long recognized that a multiple owner's misconduct at one station can shed light on the company's bonafides everywhere else. In Heritage, 8 FCC Rcd at 5607, the Commission took jurisdiction of a complaint that a multiple station owner violated the EEO Rule in most of the cities in which it operated,^{470/} even though the stations' renewals came due at

^{470/} The Heritage principle had long been applied in reverse, with evidence of EEO compliance at other stations being invoked as evidence in mitigation of possible EEO noncompliance at one facility. See KSDK, Inc., 93 FCC2d 893 (1983), Georgia State Board of Education, 70 FCC2d 948, 967 (1979) and Scripps Howard Broadcasting Co., 67 FCC2d 1553 (1978) ("Scripps") (invoking commonly owned stations' acceptable EEO performance to support decision not to impose sanctions at the station then under review).

different times.^{471/}

The Commission should continue to retain the option of calling in renewals early when many of a group owner's facilities

^{471/} Heritage is consistent with longstanding precedent holding that a licensee's companywide misconduct is adjudicable in connection with the applications filed for any of its stations. See, e.g., Trinity Broadcasting of Florida (HDO), 8 FCC Rcd 2475 (1993) (designating for hearing a group owner's renewal application for a Florida TV station not involved in multiple ownership-related misconduct arising in connection with stations in Portland, OR, Odessa, TX and Philadelphia, PA); Dixie, 7 FCC Rcd at 5638 and Leflore Broadcasting Co., Inc. (HDO), 46 FCC2d 980, 983 (1974) (designating AM and FM renewals for hearing based on EEO allegations only at one of them); cf. Fox, 10 FCC Rcd at 8519-22 (investigation of foreign ownership allegations was considered in the context of the license renewal of one station in New York City, whose renewal happened to come due when the allegations were before the Commission in another context) and KOED, Inc. (HDO), 59 RR2d 721, 725 (1986) (designating an FM renewal application for hearing along with those of two co-owned TV stations where the (non-EEO related) misconduct occurred entirely at the television stations.)

In Heritage, the Commission did not repeat the error pointed out by the D.C. Circuit in Tallahassee, in which the Court ruled that the Commission may not ignore minority exclusion at co-owned stations on the pretext that those stations' renewals are not before the Commission at that moment. Id., 870 F.2d at 710. Before Heritage, the Commission's refusal to consider co-owned stations' records as evidence of misconduct had been taken to extremes. In Federal Broadcasting System, Inc. (HDO), 59 FCC2d 356 (1976) ("Federal"), the Commission designated the renewal applications of Rochester, New York station WSAY(AM) and commonly-owned Cheektowaga (Buffalo), New York station WNIA(AM) for hearing. The WSAY(AM) application was designated on, inter alia, an EEO issue. Id. at 365. The record before the Commission at the time of designation showed that WSAY(AM) had no EEO program, even on paper, that it had hired no minorities during the license term, that one minority had complained of discrimination, and that the station used gender-specific, job-specific employment application forms ("Application - Male" for announcers, "Application - Female" for clerical personnel). However, the Commission declined to specify an EEO issue in designating WNIA(AM)'s renewal application for hearing, even though its EEO practices and their outcome were identical to those of WSAY(AM). Id. at 371-72. Considering these allegations when raised in the citizen group intervenor's motion to enlarge, the Review Board held that in Federal, the Commission had provided a "reasoned analysis" of its differential treatment of the two stations' EEO problems. Federal Broadcasting System, Inc., 62 FCC2d 861, 866-67 (Rev. Bd. 1977).

manifest a continuing violation of the new EEO regulations.^{472/}

5. EEO noncompliance at headquarters operations

Headquarters operations typically have worse EEO records than licensed stations. See p. 47, Table 2 *supra*. With the growth of superduopolies, headquarters operations are likely to grow in size at the expense of employment at regulated stations. Thus, headquarters units should also be covered by the Heritage principle.^{473/}

^{472/} See Transferability of Broadcast Licenses, 53 RR2d 126, 127 (1983) ("[w]here serious charges are made against a multiple station owner some of whose license terms have not expired, the Commission retains the option, under §73.3539(c) of its rules, to direct the broadcaster to submit renewal applications in advance of their scheduled due date. See Leflore Broadcasting Co., Inc., 36 FCC2d 101 (1972)").

^{473/} The Commission has long recognized that a licensee's EEO policies at nonlicensed facilities may be useful evidence of whether or not there is a corporate policy of discrimination. See Town and Country Radio, 65 FCC2d 694 (1977) (considering effect of EEO violations at stations previously owned by a construction permit applicant); Scripps, 67 FCC2d at 1554 (considering a newspaper's EEO behavior as evidence of the EEO policies of a commonly owned broadcaster). See also Chapman, 24 FCC2d at 282 (considering the character impact of a broadcast company shareholder's participation in a decision to maintain segregation at a cemetery).

In determining which nonlicensed facilities are closely enough related to the broadcast station to allow EEO violations at the nonlicensed facility to support an inference that there is a corporate policy of violating the EEO regulations, the Commission might apply the test used to determine whether a subsidiary and its parent are considered integrated for Title VII purposes. Such enterprises are considered integrated when the subsidiary is wholly owned and the parent exercises control over the subsidiary's employment decisions. See Armbruster v. Quinn, 711 F.2d 1332, 1337 (6th Cir. 1983). Armbruster essentially adopted the test formulated by the NLRB and approved in Radio Union v. Broadcast Service, 380 U.S. 255 (1965) (*per curiam*). That test assesses the degree of (1) interrelated operations; (2) common management; (3) centralized control of labor relations, and (4) common ownership. See also Wynn v. Dixieland Foods, Inc., 49 FEP 416 (M.D. Ala. 1989) (discovery was directed at entire division of 50 stores, due to parol evidence that Blacks were discriminated against throughout the entire division.)

**6. EEOC charges, whether or not there is
a final order, in exceptional cases**

The NBC Policy is the discriminator's best friend, and it should be repealed. In handling EEOC charges, the Commission should return to its original intent when it adopted its nondiscrimination policy in 1968. At that time, the Commission understood that to eliminate discrimination from the broadcasting industry, it must consider evidence that specific individuals were victims of that discrimination. Therefore, the Commission determined that "a petition or a complaint raising substantial issues of fact concerning discrimination in employment practices calls for full exploration by the Commission before the grant of the broadcast application before it....Furthermore, the issue is one which would in almost all cases where a substantial showing is made, require a hearing for its resolution." Nondiscrimination - 1968, 13 FCC2d at 771. A year later, the Commission concluded that it need not "await a judgment of discrimination by some other forum or tribunal" in order to help implement the national policy against discrimination. Nondiscrimination - 1969, 18 FCC2d at 241.

That changed in 1976, when the Commission adopted the NBC Policy over the dissents of Commissioners Hooks and Fogarty. Under that policy, the Commission generally declined to review allegations that a broadcaster had violated the nondiscrimination provision of the EEO Rule only if those allegations were made by a person also claiming, in a Title VII charge, to have been a victim of that discrimination. FCC review of these allegations would only

occur once there was a final order of the EEOC or a court. NBC, 62 FCC2d at 582.^{474/}

The Commission should repeal the NBC policy and repeal its 1968 nondiscrimination policy. At a minimum, the Commission should announce that as part of its Zero Tolerance Policy, it will be much more flexible in considering some individual allegations of discrimination.

The NBC policy, as applied to discrimination cases, has immunized every discriminator from Commission review. Twenty years of experience with the NBC Policy have yielded only three cases in which the FCC has had an opportunity to review a final order, as discussed below.

First, in 1977, citing the NBC Policy, the Commission declined to consider six pending Title VII charges against two large Nashville radio stations, WSM, 66 FCC2d at 1006-1008 ¶¶29-32; see n. 19 (dating the litigation to 1973). The litigation concluded in 1989 with final court orders of race discrimination against three of the complainants. Unfortunately, by then, the stations had changed hands three times.

Seven years later, in Washington's Christian Television Outreach, Inc., 99 FCC2d 395, 423-24 (Rev. Bd. 1984) ("WCTO"), the Review Board took into account a final order of discrimination against a construction permit applicant, but held that the case was

^{474/} In The New York Times Broadcasting Service, 63 FCC2d 695, 700 (1977) ("New York Times"), the Commission extended the NBC Policy even beyond the final order stage. In New York Times, the 6th Circuit had rendered a final order that discrimination had occurred. Nonetheless, the Commission expressed only its "concern with the court's finding" and indicated it would await the results of the proceedings on remand in the District Court before "deciding whether further Commission action is warranted."

an aberration since it involved a Black woman discriminating against a Hispanic woman.

Finally, in Atlantic City Community Broadcasting, Inc., 6 FCC Rcd 925, 927 ¶¶12-14 (Rev. Bd. 1991) ("Atlantic City"), the Review Board disqualified a construction permit applicant for failing to report an adverse final order in a sexual harassment case. However, the Board did not address the question of whether the underlying sexual harassment would have compelled denial of the application. Id. at 936 n. 3.

These three cases are all the Commission had to show for the NBC Policy in 22 years. Obviously, the NBC Policy is a failure. The chief cause of this failure is the fact that Title VII charges against broadcasters almost never result in a final order, for three reasons.

First, the charging party must be very highly motivated. Broadcasting is a close-knit industry in which an accommodating personality, a reputation for loyalty, and a willingness to conform are considered desirable attributes. Broadcast professionals' fear of retaliation or "blackballing" is enormous.^{475/} Broadcasting is not a highly unionized industry, and civil rights organizations have few resources to assist discrimination victims. Thus, even the rare individual who places her career on the line by filing a Title VII charge will find it quite difficult to spend perhaps a decade of her life in litigation.

^{475/} See, e.g., Field Communications Corp., 68 FCC2d 817, 819 n. 4 (1978), in which the Commission declined to consider a citizen group's affidavit that a Black employee was a victim of discrimination but feared retaliation if she came forward.

Second, with its license potentially at stake, a broadcaster has an enormous incentive to delay the resolution of the case and wear down the resource-poor plaintiff. MMTC has not yet seen a case in which a civil rights plaintiff's resources exceeded those of the broadcaster.

Third, broadcasters use their financial clout to keep discrimination victims out of the court. Broadcasters' incentives to do so are great because a monetary settlement with the plaintiff is always less expensive than risking the license. If a court found in favor of a Title VII plaintiff and a court of appeals affirmed, any rational broadcaster would quickly offer the plaintiff a nominal sum in excess of the amount of the verdict, and a promise not to appeal further, in exchange for her confidentiality agreement, her consent to a motion to vacate the judgment, and her consent to the filing of a report with the FCC saying that the case had been settled for an undisclosed amount. No rational plaintiff would refuse to accept this deal. Once a case is settled in this manner, the FCC's policy has been to do nothing more.^{476/}

^{476/} In every area of broadcast regulation except the NBC Policy, the Commission does not permit private parties, through settlement, to substitute their judgment of the public interest for the Commission's judgment. See WWOR-TV, Inc., 6 FCC Rcd 1524 (1991) and California Broadcasting Corp., 6 FCC Rcd 283 (1991) (rejecting settlements). Instead, in rendering its decision in an EEO case, the FCC will only review the facts of record which did not trace their origin to the Title VII charge. See Holiday Broadcasting Company, Debtor in Possession, 10 FCC Rcd 4500, 4502 n. 9 (1995) (Title VII charge was dismissed after it was settled; the Commission chose not to investigate further absent a court finding of discrimination).

It is no wonder, then, that the FCC has only learned of final orders of discrimination when the broadcaster or permit applicant was dishonest and got caught by a mutually exclusive applicant (Atlantic City), or had left the industry (WSM), or when the case was an aberration (WCTQ). Not once in 22 years has the FCC had before it a final order of discrimination, in a non-aberrant case, involving a licensee over which it still had jurisdiction.^{477/}

Nonetheless, under the former EEO Rule, the Commission routinely rendered affirmative holdings that renewal was appropriate because there were no individual allegations of discrimination, even if there was overwhelming anecdotal or statistical evidence of discrimination.^{478/} These holdings were untenable as long as the FCC blinded itself to the best evidence of discrimination.

Twenty years of evolution in the industry and in the EEOC have rendered the NBC Policy obsolete by undermining the EEOC's

^{477/} The Bureau has left the door slightly open to the consideration of a Title VII charge before a final order. Recently, the Bureau held that discrimination charges are "generally events of little immediate significance in our assessment of the licensee's EEO compliance" (emphasis supplied; fn. omitted). The Bureau quite properly did not hold that these charges have no significance. McDonald Investment Company, Inc. (MO&O) (Chief, MMB, released August 8, 1996) at 4 ¶9 (fn. omitted). It cannot so hold, since the FCC/EEOC Agreement requires requires the FCC, when it receives an EEO complaint, to refer the charge to the EEOC "in addition to any separate action it may take to investigate such charges within the context of the public interest finding it must make on any broadcast application." Id., 70 FCC2d at 2331 §III(b) (emphasis supplied).

^{478/} See, e.g., KGET(TV), Inc., 11 FCC Rcd 4168 ¶5 (1996); Radio Ohio, 7 FCC Rcd at 6359 ¶25, South Carolina Renewals, 5 FCC Rcd at 1708 ¶38.

ability to handle Title VII charges,^{479/} or by undermining the FCC's ability to adjudicate discrimination allegations without access to Title VII charges:

- Discriminators have become so sophisticated that they seldom make the mistake of revealing their discriminatory policies and actions, and discriminators have become more virulent than ever before. See pp. 18-24 supra.
- Station valuations have gone through the ceiling in the past 20 years, and stations are being sold much more frequently. See p. 8-12 supra. Thus, it behooves a station subject to a Title VII charge to resolve the litigation short of finality with a sealed settlement in order to prevent the FCC from ever learning of the discriminatory acts. See pp. 91-97 supra.
- The EEOC lacks the budget to handle an increasing caseload, causing long delays and high rates of case closure owing to a shortage of resources for investigations. See p. 13 supra.
- Since the NBC policy was adopted, all of the other tools available to promote diversity are gone -- including ascertainment, the Fairness Doctrine, program content guidelines, the minority ownership policies, competing applications and the duopoly and one to a market rules. See pp. 171-74 supra.

The NBC Policy is the antithesis of sound law enforcement because it prevents the FCC from learning of violations of its rules in a timely manner,^{480/} and because it prevents the FCC from

^{479/} Repeal of the NBC Policy would not require the FCC to renegotiate the provision of the FCC/EEOC Agreement which calls for the FCC to generally defer to the EEOC's processing of Title VII charges. Id., 70 FCC2d at 2327. The FCC/EEOC Agreement already provides that "situations may arise in which the Commission may act before a court decision." Id. at 2328 ¶21; see also id. at 2327 (providing that the FCC may inquire into EEO complaints "even before the EEOC's conciliatory process ends", citing Report on Uniform Policy as to Violations by Applicants of Laws of the United States, 1 RR, Part 3, §91.495 (1951), 42 FCC2d 399 (1973)).

^{480/} A licensee's statements to one agency certainly may shed light on that licensee's concurrent policies as reported to another agency. See, e.g., Fox, 10 FCC Rcd at 8519-22 (disparities between FCC and SEC filings).

fully enforcing its most important character and diversity rule.^{481/}

Moreover, the NBC Policy is inconsistent with a policy of Zero Tolerance for discrimination. It has never made any sense for the Commission to refuse to consider evidence of a violation of EEO regulations from persons who are the best witnesses to those violations -- persons so highly motivated that they have placed their careers and personal reputations on the line by filing Title VII charges. Indeed, to show how illogical the NBC Policy really is, consider this: if an EEO complainant filed a complaint with the FCC, but did not file a Title VII charge, and asked the FCC not to crossfile the charge with the EEOC, the NBC Policy would not apply, and then and only then would the FCC have to consider the evidence. This means that only by foregoing the opportunity to receive back pay and other individualized relief can a discrimination victim cause the FCC to consider her grievance. That is far too high a price for an individual to pay just to have the FCC review her complaint.

At a minimum, the Commission should state that the NBC Policy would not be a bar to considering three narrow but important types of allegations arising in Title VII cases: (a) allegations that are so egregious that they shock the conscience; (b) numerous allegations against the same licensee that they demonstrate a pattern of noncompliance; and (c) allegations which, although directed primarily to discrimination, also reveal substantial

^{481/} See BBC, 556 F.2d at 62 (holding that it was an abuse of discretion for the FCC to disregard "allegations of overt discrimination in hiring and firing" which "remained contested and unsatisfied.")

violations of outreach regulations. In all of these cases, a review of the victims' complaints, filed with the FCC and the EEOC, should first convince the FCC that the allegations are sufficient to make eventual success on the merits likely.

**a. The allegations are so egregious
 that they shock the conscience**

Among the "situations [which] may arise in which the Commission may act before a court decision", FCC/EEOC Agreement, 70 FCC2d at 2328 ¶21, are cases in which the allegations shock the conscience. We offer these guidelines to help identify these cases:

1. The allegations show that the deliberate policy of a company, approved at the highest levels, is to disobey or disregard Title VII and the new EEO regulations; or
2. The allegations show that a wide class of persons is affected by the discrimination, including individuals who would not know that they have been affected; 482/ or
3. The allegations, if true, show that the licensee's character is so nonremediably corrupt that no other course of action but denial of a broadcast authorization would be appropriate.

**b. Several charges are pending
 against the same licensee**

The FCC's use of the NBC Policy to shield broadcasters from the allegations of EEO complainants reached extreme proportions in the mid-1980's. In Banks, FCC 85-122, 22 of the 23 Black employees came forward with Title VII charges, and the Commission ignored them all. In WAVY, 53 RR2d at 658, eleven of the station's

482/ Discrimination commonly involves practices aimed at groups rather than at specific individuals. See, e.g., Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973). Thus, the informed allegations of one highly motivated, reliable individual may reveal that a company discriminates against an entire group.

fourteen Black employees came forward with Title VII charges. The Commission ignored them as well. Finally, in Beaumont, 854 F.2d at 507, the Commission failed to credit ten Black former employees' allegations even in the face of multiple inconsistent accounts by the licensee.

When the majority of a station's minority or female employees -- persons familiar with FCC requirements -- place their careers on the line to offer themselves as witnesses to the FCC, something has gone terribly wrong, and it is inconceivable that the FCC would do nothing.

The FCC should do to Banks and WAVY what Brown I did to Plessy. Never again should the Commission refuse to listen to a complaint by most of a station's minority or female employees.

**c. The allegations reveal violations
of the outreach requirements so
serious that they suggest
intentional discrimination**

The FCC/EEOC Agreement is aimed at preventing jurisdictional overlap in cases involving discrimination. No such overlap exists between Title VII, or any EEOC rule or policy, and the proposed new outreach regulations. The EEOC is powerless to act on those elements of a Title VII charge which contain allegations of discrimination in recruitment. Since there can be no final EEOC adjudication of these allegations, there is no reason to hold these allegations hostage to finality on the discrimination allegations. Consequently, the FCC should sever the outreach allegations from the Title VII charge and consider them.

VIII. What Remedies Should Be Imposed For EEO Violations?

The NPRM proposes that enforcement occur throughout the license term and at renewal time. NPRM, 13 FCC Rcd at 23030 ¶74. We agree. Enforcement geared only to renewal time has resulted in too many broadcasters being attentive to EEO for only a few months out of eight years. On the other hand, without linking EEO enforcement to renewal, the Commission cannot be faithful to its Section 309 responsibility to renew licenses only when the public interest so warrants. Decoupling EEO from renewals would require the Commission to find that EEO noncompliance would serve the public interest. See pp. 37-39 supra.

The NPRM does not expressly seek comment on sanctions and remedies. Most of the EEO Supporters signed on to the MMTC Streamlining Comments, which included several proposals relating to sanctions and remedies. Id. at 334-345. We incorporate those proposals by reference herein, noting, however, that the Commission will need to formulate a forfeiture schedule linked to recruitment as opposed to hiring data in light of Lutheran Church. This is an appropriate subject for initial discussion by the Task Force on Equal Opportunity we propose in the following section.

IX. Should The Commission Establish A Task Force On Equal Opportunity?

The Commission is more likely to reach consensus if it creates and institutionalizes a mechanism for dialogue on these issues, including those outside the scope of the NPRM. Such dialogue is especially appropriate given the interrelationship between EEO and other Commission policies, including multiple ownership, attribution, spectrum management and minority ownership.

To institutionalize this dialogue, the Commission should establish a Task Force on Equal Opportunity, with membership drawn from industry, community groups, the EEOC, the U.S. Commission on Civil Rights, the Civil Rights Division of the U.S. Department of Justice, the National Telecommunications and Information Administration, and the Commission's staff ex officio. The Task Force would monitor and refine EEO enforcement over time and marshall the collective resources of the industry and the civil rights community to foster equal employment opportunity.^{483/}

The Task Force would promote efficiency by ensuring that the FCC's civil rights policies affecting each of the distinct but converging media and telecommunications industries are internally consistent, albeit they are housed in different offices.^{484/}

^{483/} It may be that such a Task Force would need to be institutionalized as an advisory committee under the Federal Advisory Committee Act (FACA). See, e.g., Establishment of an Advisory Committee to Negotiate Regulations, 9 FCC Rcd 6706 (1994) (seeking comment on whether to establish an advisory committee under FACA to negotiate regulations for hearing aid compatible telephones.) For the moment, a more flexible, less formal process such as a task force may be sufficient.

^{484/} FCC Civil Rights policy is made in several places. The Enforcement Division of the Common Carrier Bureau handles common carrier licensees' EEO filings pursuant to 47 CFR §§1.1815, 21.307 and 23.55, as well as wireless, CRMS and other telecommunications EEO filings pursuant to 47 CFR §§21.307(g), 22.321 and 90.168. It is also responsible for implementation of Section 255 of the Act, relating to accessibility of telecommunications by persons with disabilities. The Network Division of the Common Carrier Bureau implements Title IV of the Americans with Disabilities Act and the Hearing Aid Compability Act of 1988, established by 47 U.S.C. §§225 and 710 respectively. The EEO Branch of the Enforcement Division of the Mass Media Bureau handles broadcast and cable EEO, including the administration of the FCC/EEOC Agreement. The Office of Workplace Diversity handles internal EEO and Title VII coordination under the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 847 (1996). As far as we know, no one monitors cable and telecommunications redlining.

A Task Force on Equal Opportunity could assist the Commission by recommending policy in emerging areas of civil rights jurisprudence for the media and telecommunications.^{485/} It can also work with industry and the public to promote diversity through nonadversarial programs and initiatives which reward "Superperformers" for going beyond the minimum call of duty to promote equal opportunity.^{486/} Using industrywide (Form 395 and other) data and commissioned research, it could provide significant input into the Commission's systemic review of how to tailor and refine its EEO policies, with an eye to achievement of their goals and ultimate sunseting of the regulations.^{487/}

A Task Force could resolve enforcement and implementation issues which are outside the scope of this proceeding or which the Commission might not fully resolve at this time, including:

^{485/} The most critical needs relate to redlining in the cable and telecommunications industries, and the consequences of school segregation on the e-rate and other programs to promote inclusion and universal service.

^{486/} Several such initiatives were proposed in the MMTC Streamlining Comments at 357-64. Examples include the elimination of sanctions passing from a former owner; expedited treatment of Form 301, Form 314 and Form 315; fee waivers; bidding credits; priority for selection of frequencies; multiple ownership waivers; and rebuttable presumptions of EEO compliance. Id. There is some precedent for EEO incentivization. See Turner Communications Corp., 47 RR2d 513 (1980) (EEO conditions normally flowing to assignee are removed in light of the outstanding EEO performance of assignee Group W at its many stations.)

^{487/} See pp. 39-54 supra.

^{488/} The FCC might follow the EEOC's example in investigating the "best" EEO practices by companies and then offering this information to other businesses in order to increase voluntary compliance. The EEOC established a task force to achieve this goal. "EEOC Plans To Identify and Disseminate Private Sector's 'Best' EEO Practices, Fair Employment Report, February 26, 1997, at 34.

1. Recommending how broadcasters should be expected to recruit minorities and women using community organizations, media and other resources, if the Commission is unable to resolve that issue in this proceeding. See pp. 221-27 supra.
2. Considering whether nontraditional individual recruitment initiatives, or joint industrywide initiatives that may not involve all licensees, should play a role in EEO enforcement or program evaluation. See pp. 230-34 supra. These might include, inter alia, recruitment assistance tailored to small broadcasters, training, internship and scholarship programs, job fairs, and EEO compliance training for senior and middle managers. 488/
3. Developing model recordkeeping forms for job applicants and interviews, thus saving broadcasters the time and expense of designing their own.
4. Developing an enforcement protocol for Second Generation issues, including work assignments, working environment, promotion, compensation, benefits and termination. See pp. 234-41 supra.
5. Developing an enforcement protocol covering airtime sales using anti-minority, anti-woman appeals such as "no Black, no Spanish" dictates. See pp. 306-308 supra.
6. Developing an enforcement protocol covering the use of brokers that do not notify minorities of stations for sale. See pp. 308-10 supra.
7. Developing a protocol for alternate dispute resolution, such as the highly successful mediation programs operated by the D.C. Circuit of the U.S. Court of Appeals and by the EEOC. 489/

489/ The EEOC's mediation program resolved over 2,400 bias charges from FY 19965 through FY 1998, resulting in benefits of \$27.8 million received by charging parties. "EEOC Plans To Expand Alternative Dispute Resolution Effort Next Year; Charge Backlog Drops," Fair Employment Report, December 16, 1998, at 191. Its goal is the closure of 10,000 bias charges by Octrober, 2000. "EEOC Expands Mediation Program Nationwide and Sets Goal of Mediating 10,000 Charges," Fair Employment Report, February 24, 1999, at 26.

8. Sponsoring technical assistance seminars for broadcasters to help introduce them to the new regulations and resolve their questions well before the next renewal cycle begins. 490/
9. Reviewing other federal agencies' civil rights enforcement programs to ensure that the FCC's programs do not conflict with those of sister agencies, to identify opportunities for collaboration and information sharing, and to consider whether the FCC should adopt other agencies' successful program.
10. Reviewing the function, structure and enforcement of regulations concerning licensees' procurement of services by women- and minority-owned businesses.
11. Evaluating whether the FCC should centralize its civil rights functions. See p. 334 n. 484 supra.

With six current advisory committees chartered under FACA, there is clear precedent for using such entities to resolve complex issues.491/

490/ With similar goals in mind, the EEOC recently announced a series of Technical Assistance Program Seminars. "EEOC Issues Slate of Technical Assistance Seminars for Private-Sector Employers," Fair Employment Report, February 24, 1999, at 31.

491/ These include the 2000 WARC Radiocommunication Conference (WRC-2000) Advisory Committee; the National Advisory Committee (NAC) overseeing the Emergency Alert System; the Network Reliability and Interoperability Council (NIC) generally mandated to maximize accessibility and interoperability of public telecommunications systems and handle such issues as the Y2K problem; the North American Numbering Council (NANC); the Technical Advisory Committee (TAC), and the Public Safety National Coordination Committee (PSNCC), which makes recommendations for the interoperability standards for the 700 MHz public safety band. However, it may not be necessary to proceed through so formal a vehicle as an advisory committee. See p. 384 n. 483 supra.

Other agencies have used advisory vehicles to assess the efficiency and efficacy of their civil rights programs.^{492/} In like fashion, a Task Force on Equal Opportunity would enable the Commission to engage experts and advocates from all sectors of society in the task of transitioning to a new era of EEO compliance, ensuring that enforcement and implementation will be fair, efficient and nonburdensome to all concerned.

X. CONCLUSION

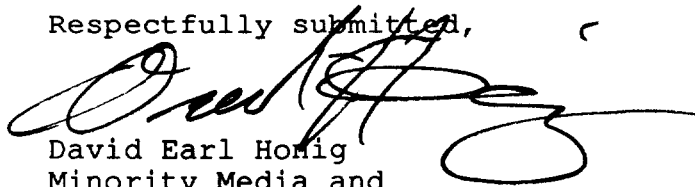
Seldom are the stakes higher for the public interest than they are in this proceeding. Some nonminority broadcasters and trade groups seek to eviscerate the FCC's only remaining meaningful diversity initiative.

The NPRM was magnificent and the Commission should adopt most of its proposals. The Commission should draw deep from the well of leadership, recognize that sometimes it cannot please all constituencies, stand firm in defense of stronger EEO enforcement, adopt a policy of zero tolerance for discrimination, and design a plan to provide full equal opportunity by 2009, the one hundredth anniversary of the birth of broadcasting.^{493/}

^{492/} For example, in 1993 the Department of Transportation convened civil rights directors, DOT administrators and civil rights officials from other agencies to obtain advice on how best to manage and implement the civil rights responsibilities entrusted to DOT by Congress. See Hon. Federico Peña, Secretary, Department of Transportation, "Review of Civil Rights Consolidation Options," April, 1994, p. i, Executive Summary. Comparable processes of self-evaluation and reorganization took place at six other agencies between 1992 and 1997, resulting in the establishment of single, centralized offices of civil rights in those agencies; these agencies included the departments of Justice, Education, Health and Human Services, Agriculture, Housing and Labor.

^{493/} This concludes Volume II of our Comments. Volume III contains statements of expert witnesses, and Volume IV organizes, annotates and analyzes those witness statements.

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March 19, 1999